MAY 8 1957
JOHN T. FEY, Clerk

No. 979

In the

Supreme Court of the United States

OCTOBER TERM, 1956

INTERNATIONAL DERRICK AND EQUIPMENT COMPANY and its successor, DRESSER EQUIPMENT COMPANY,
Petitioner,

v.

R. L. CROIX AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Intervener,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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v.

R. L. CROIX AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Intervener,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, International Derrick and Equipment Company and its successor, Dresser Equipment Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 13, 1957 (Petition for Rehearing in the said cause having been denied on March 13, 1957).

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 419-431), printed in Appendix A hereto, infra, page 15, is reported in 241 Federal 2d 216.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered February 13, 1957 (R. 432; Appendix B, infra, page 29). Rehearing was denied on March 13, 1957 (R. 442; Appendix B, infra, page 30). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

III.

QUESTIONS PRESENTED

1. Whether a manufacturer is liable for a personal injury arising from a defect after a chattel has been in use for a period of seven (7) years.

2. Whether a manufacturer is liable for a personal injury arising out of the use of a chattel for which it was not designed and not reasonably foreseeable.

IV.

STATEMENT

This suit was originally instituted in the State Court of Ector County, Texas, by Respondent, R. L. Croix, claiming

damages for personal injuries due to an alleged defect in that portion of a derrick which he was in the process of erecting for Rumbaugh Rig Company when the gin pole leg collapsed on June 13, 1952. Due to the diversity of citizenship and the amount involved, the case was removed to the United States District Court for the Western District of Texas, Pecos Division. After pleading defensively that the use of the derrick over a seven (7) year period of time relieved the manufacturer of all liability and further that the use at the time of the accident was not a use for which it was designed or reasonably foreseeable, the evidence was submitted to the jury. Due to the complicated manner in which the derrick is erected and the accident occurred, the evidence produced by both sides showed that the accident occurred when a gin pole leg collapsed and struck the Respondent's arm. The derrick is a structure consisting of steel pieces which are erected to a point approximately one hundred thirty-six (136) feet from the ground. At that point a platform is erected on which the gin pole is constructed. The gin pole is a structure which consists of a house-type frame and is placed horizontally with the top portion of the housing having a U-bolt through it to bring into place the crown block. After the crown block is in place the gin pole performs no other usefulness as the crown block is then anchored between the side headers and the platform at the top of the derrick. At the time of the accident the gin pole was in the process of being erected and the only portion of the gin pole that had been erected was one (1) lone leg which was anchored solely at the bottom

welded to plate and bolted to the platform. This gin pole leg consists of a four (4) inch angle iron welded to a plate with a three-eighth (3/8) inch fillet weld on the inside of the angle where the angle iron is attached to the plate. This gin pole leg is approximately nine (9) feet long. There was a pulley inserted in one (1) side of the angle near the top of the angle iron between eight (8) and nine (9) feet from the base plate. Through this pulley a rope was inserted which ran at an angle to the opposite corner of the derrick floor where another pulley was located and out to a drum on an automobile. The other end of the rope was attached to two (2) side headers which weigh one hundred ninety-six (196) pounds each, or a total of three hundred ninety-two (392) pounds. The side headers were then pulled up through the center of the derrick with the gin pole leg acting as a crane for a pulley from the force being exerted by the winding of the rope on the drum on the automobile. Since the rope weighs approximately sixty (60) or sixty-five (65) pounds and you have as much force pulling up as you do down and without counting any friction there was exerted approximately one thousand (1,000) pounds of a diagonal pulling force on this single unsupported column in the air. There is also some testimony that the base upon which the plate was attached was "wiggly." When the load had reached almost to the top where the platform was located, the gin pole leg collapsed by breaking at the weld with the resulting injuries to the Respondent.

Defensively the evidence introduced by the Petitioner showed that the derrick and the gin pole leg in question was

originally sold by the Petitioner on December 13, 1945, to the Dominican Seaboard Oil Company, according to the stipulation of the parties (R. 294). Thereafter the gin pole leg and derrick was shipped to the Dominican Republic and used for the drilling of two (2) oil wells (R. 319, 320). The derrick was stacked and moved while in the Dominican Republic approximately ten (10) times and was exposed to salt water and salt air up until the time it was sold to Lucey Products Corporation in June of 1948 (R. 321). That the said derrick and gin pole leg were purchased in August of 1948 from Lucey Products Corporation by Trinity Drilling Company (R. 281, 282). Said derrick and gin pole leg were used by Trinity Drilling Company in the drilling of fourteen (14) wells which means that the gin pole leg and derrick was erected fourteen (14) times and dismantled fourteen (14) times (R. 282, 283). In addition thereto, said derrick was skidded some three (3) or four (4) times for the drilling of some three (3) or four (4) more wells (R. 283, 284). Respondent admitted on cross-examination that the gin pole leg and derrick that was erected was a used derrick (R. 120), and that the derrick pieces including the gin pole legs when they are dismantled are thrown in a basket and then thrown on the truck and receive pretty rough handling (R. 121). Respondent further admitted that the underneath portion of the angle iron was rusty at the point of collapse (R. 125). It was further testified by Petitioner's witness that the galvanizing process does not reach between the plate and the angle iron, thus exposing that area to rust (R. 312). The witnesses

who were asked concerning the strain thrown upon the derrick and the gin pole during the skidding operation testified that in skidding a derrick it threw a tremendous strain upon the derrick and gin pole (R. 283, 312, 313). Furthermore, the fact that the derrick was galvanized did not necessarily mean that it would not deteriorate due to exposure to salt water and other corrosive materials (R. 312, R. 336). It was also testified to that the steel derrick and gin pole legs, in particular, deteriorate with use and age (R. 336, 337). The person who had supervised the erecting and dismantling of the derrick in question testified that it was only natural for the various pieces to be bent (R. 317), and their being damaged by trucks running over the pieces of the derrick (R. 259). It was further testified that metal crystallizes and develops metal fatigue with heavy loads being placed upon it from time to time (R. 357).

Furthermore, the Petitioner to prove that the use at the time of the accident was not a use for which it was designed or could be reasonably foreseeable, introduced evidence from Mr. Eugene F. Shields, Assistant to the Executive Vice President of the Petitioner, who definitely stated that the gin pole leg was not designed or manufactured for such purpose (R. 297), and then in great detail explained from an engineering standpoint concerning the torsion, slenderness ratio and other engineering factors to prove that it was not so designed (R. 298-309). It was further testified that the derrick was assembled by the manufacturer and each weld was inspected by a separate department of in-

spectors (R. 325-326). It was also brought out that the derrick is designed according to the plans and specifications approved by the American Petroleum Institute and that the load limit upon each gin pole leg that the derrick was designed for in connection with its breaking point as far as the weld is concerned was three hundred (300) pounds (R. 303), and that at the time the accident occurred there was at least nine hundred twenty (920) pounds of pull upon the member at the place where the break occurred. It was also pointed out in the testimony by Mr. Shields that the Petitioner had been manufacturing derricks since 1921 and had manufactured between ten thousand (10,000) and fifteen thousand (15,000) derricks and there had been no claim made by anyone against the Petitioner prior to this on account of any gin pole leg failing in the manner in which it is alleged for which Respondent claimed injury (R. 313). Also the testimony of Mr. C. R. Athy who is National Chairman of the Manufacturers' Sub-Committee for derricks and masts of the American Petroleum Institute and has been chairman for twenty (20) years showed that the gin pole leg was not designed to be used as a crane or an arm for a hoist (R. 326, 327), and also explained in great detail from an engineering standpoint that the derrick was built to American Petroleum Institute's specifications and reiterated the testimony of Mr. Shields concerning the load limit that the specifications for each gin pole leg could withstand (R. 327-341). Furthermore, the witness, J. W. Hall testified that what the Respondent was doing at the time of the accident was not correct from an

engineering standpoint as it was "very much like loading a top of a flagpole" (R. 286). Furthermore, Petitioner also offered to prove that the use of the gin pole leg which was made at the time of the accident was not reasonably foreseeable in that insofar as the manufacturer had knowledge of, pieces of derrick were erected by means of an erector's gin pole which is a separate piece of equipment furnished by the rig builders and no piece of the derrick itself was designed to act as a hoist for raising other pieces of the derrick (R. 297-309, 326-341). Many of the witnesses testified that the use of the gin pole leg and the manner it was being used at the time of the accident was improper, unsafe, and not a customary use in good rig building practices (R. 270, 284, 285, 363, 368, 369).

After being charged by the Court, the jury returned a verdict in favor of the Respondent and against the Petitioner in the sum of Six Thousand Two Hundred Fifty Dollars ($6,250.00), and judgment was entered thereon. From the District Court's judgment Petitioner perfected its appeal to the Court of Civil Appeals for the Fifth Circuit, which Court affirmed the judgment of the Trial Court on the following basis:

1. Although recognizing the rule that a lapse of time relieves the manufacturer from liability, the Court entered upon a new theory of law dealing with moving parts and non-moving parts; and

2. The Court entirely disregarded all evidence upon the point that this was the first accident ever occur-

ring that the manufacturer had notice of and also disregarded all evidence that the gin pole leg was never designed to be used in such a manner according to American Petroleum Institute specifications and found that the use at the time of the accident was reasonably foreseeable by the manufacturer.

V.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the decisions heretofore rendered by other Courts of Appeals and is in conflict therewith.

The Court of Appeals recognized the rule that a lapse of time of seven (7) years might in some instances relieve the manufacturer of liability, but in this particular instance it draws the distinction between parts which are moving and parts which are not moving in order to establish liability against the Petitioner. This is the first time that such a distinction has been enunciated by any Court in English or American Jurisprudence and is in conflict with all previous decisions rendered by other Courts of Appeals. In this regard there are no specific decisions rendered by the Courts of Texas dealing with this problem except dictum in the case of *Southern Oil Company v. Church (Ct. of Civ. App.), 72 S. W. 797*, and no such distinction was made in that case.

Furthermore, the only evidence offered showed that no previous accident of a similar nature was ever reported

to the Petitioner after it had manufactured some ten to fifteen thousand derricks, and furthermore, said derrick was not designed or built to be used in the manner it was being used at the time the accident occurred.

The opinion of the Court of Appeals is in conflict with the following decisions of other Courts of Appeals: *Lynch v. International Harvester Company (10 Cir.), 60 F. 2d 223; Ford Motor Company v. Wolber (7 Cir.), 32 F. 2d 18; Schindley v. Allen-Sherman-Hoof Company (6 Cir.), 157 F. 2d 192; Borg-Warner Corporation v. Heine (6 Cir.), 128 F. 2d 657; Standard Conveyor Company v. Scott (8 Cir.), 221 F. 2d 460, Cert. Den. 76 S. Ct. 62, 350 U. S. 830; Hentschel v. Baby Bathinette Corporation (2 Cir.), 215 F. 2d 102, Cert. Den. 75 S. Ct. 663, 349 U. S. 923, 99 L. Ed. 1254; Pontifex v. Sears Roebuck & Company (4 Cir.), 226 F. 2d 9[illegible]; Purkey v. Sears Roebuck & Company (5 Cir.), 220 F. 2d 700.*

The decision of the Court of Appeals in this case being therefore in conflict with the above opinions creates a situation in which this Court has granted writs of certiorari. *Rules of the Supreme Court of the United States, Rule 19(1)(b); Reconstruction Finance Corp. v. Bankers Trust Co., 318 U. S. 163, 87 L. Ed. 680, 63 Sup. Ct. 515; Helvering v. Sabine Transp. Co., Inc., 318 U. S. 306, 87 L. Ed. 778, 63 Sup. Ct. 569; Helvering v. American Dental Co., 318 U. S. 332, 87 L. Ed. 785, 63 Sup. Ct. 577; Clearfield Trust Co. v. United States, 318 U. S. 363, 87 L. Ed. 838, 63 Sup. Ct. 573; Corn Exchange Nat. Bank & Trust Co. v. Klauder, 318 U. S. 434, 87 L. Ed. 500, 63 S. Ct. 679,*

144 A. L. R. 1189; Helvering v. Oregon Mut. Life Ins. Co., 311 U. S. 267, 85 L. Ed. 180, 61 Sup. Ct. 207; Brooks v. National Labor Relations Board, 348 U. S. 96, 99 L. Ed. 125, 75 Sup. Ct. 176; Bell v. United States, 349 U. S. 81, 99 L. Ed. 905, 75 Sup. Ct. 620; Squire v. Capoeman, 351 U. S. 1, 76 Sup. Ct. 611.

2. The questions here presented are of great importance and have far reaching effect.

Necessarily the rule imposing liability on a manufacturer for defects should have some limitation. The reason for this is that after the manufactured article leaves its hands or that of the distributor or retailer, it will necessarily fall into the hands of different persons with varied degrees of care, and who are not subject to control by the manufacturer. Certainly, accidents occurring from manufactured articles on their first use or within a short period of time after being purchased would logically impose liability upon a manufacturer and the Courts have so held. But for the Courts to hold the manufacturer liable after a thirdhanded product which has been continuously used for a seven (7) year period is a traversity upon justice and will open the gate for numerous claims of questionable character. It is imposing on the manufacturer an unreasonable obligation to be responsible for the care of its products beyond any reasonable period of time. It therefore would make the manufacturer almost an insurer of the care to be taken of products by third persons when it is common knowledge that all metals develop fatigue and chattels deteriorate with use. Actually, every manufacturer

in the United States is affected by this decision and it is a decision which has far-reaching effects. There should be some limitation to a manufacturer's liability and it should be the duty of this Court to definitely advise the manufacturing industry of its liability and how long it is going to be responsible for its product after it has been placed upon the market for use.

Furthermore, the product was designed according to the standards prescribed for the petroleum industry by the American Petroleum Institute and actually the cause of the accident was not a defective condition but the improper weight with a directional pull being exerted upon a lone unsupported beam standing in the air. It was designed to withstand three hundred (300) pounds and almost one thousand (1,000) pounds was being exerted on the weld at the time the accident occurred. Certainly there wasn't any evidence to the contrary but that it was not being used in a manner for which it was designated and the accident in question was not reasonably foreseeable. It would thus impose upon the manufacturer practically the duty of sending a man with each one of its derricks all over the world to see that the rig builders properly erected the derrick on each occasion that it was erected. This is an impossible and unreasonable burden to so impose.

3. The decision of the Court of Appeals was clearly erroneous.

The Court of Appeals while recognizing the rule that a lapse of time relieves a manufacturer attempted to draw

the fine distinction between moving and non-moving parts. This distinction has not been recognized in any previous decision and is in fact contrary to the decisions heretofore set forth.

Furthermore, is the distinction in law going to be whether the parts are movable, per se, or whether they are moved by other people? Thus, the Court will get into many, many fine distinctions ad infinitum until confusion can be the only result. Actually, the law should be more definite rather than more confusing.

The only evidence offered showed that the derrick had been in continuous use over a seven (7) year period drilling some nineteen to twenty wells and the only case cited to support the decision of the Court of Appeals concerned a coffee urn [*Reed and Barton v. Maas (1 Cir.), 73 F. 2d 359*], which coffee urn had been used only four (4) or five (5) times during a seven (7) year period. Certainly it is common knowledge that a coffee urn is manufactured to be used almost daily for the consumption of coffee, whereas it is also common knowledge that it takes as long as six months to drill a well in West Texas so that the comparison of the use in the coffee urn case and that of the use in this case of the product is ridiculous and has no relationship whatsoever.

The derrick was not designed or manufactured to be used in the manner in which it was being used at the time the accident occurred and no evidence whatsoever was

offered to the contrary. Therefore, for the foregoing reasons the decision of the Court of Appeals was clearly erroneous.

CONCLUSION

Accordingly, Petitioner prays that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Petitioner, International Derrick and Equipment Company and its successor, Dresser Equipment Company, served Respondent, R. L. Croix and Texas Employers' Insurance Association, Intervener, with three copies of the Petitioner's Petition for Certiorari in accordance with Rule 33, Subsections 1 and 3(b), by depositing copies of such Brief in the United States Post Office at Washington, D. C., air mail, postage pre-paid, addressed to Counsel of Record for Respondent, James T. Smith, First National Bank Building, Midland, Texas, and J. O. Bean, 1010 Gulf States Building, Dallas 1, Texas, sending three copies of such Brief to each of them on the ..... day of May, 1957, in accordance with Sections 1 and 3(b) of Rule 33 of the Revised Rules of the Supreme Court of the United States.

PAUL J. SEDGWICK

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APPENDIX A

Opinion of the Court Below

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16076

INTERNATIONAL DERRICK AND EQUIPMENT COMPANY and its successor, DRESSER EQUIPMENT COMPANY,

Appellant,

v.

R. L. CROIX and TEXAS EMPLOYERS INSURANCE ASSOCIATION, Intervener,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(February 13, 1957.)

Before HUTCHESON, Chief Judge, and JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: The appellee, R. L. Croix, was plaintiff in the district court and will be so referred to

here. Rumbaugh Rig Company had a contract for the erecting of a derrick for its owner, Trinity Drilling Company, in Glasscock County, Texas, where Trinity was to drill for oil. The plaintiff, an employee of Rumbaugh, was engaged in the work of erecting the derrick.

The derrick had been manufactured by International Derrick and Equipment Company, and we will refer to it in this opinion as "International" although it has changed its name to Dresser Equipment Company. The derrick was sold by International in 1945 to Dominican Seaboard Oil Company which transferred it to Compania Seaboard Dominicana de Petroleo C. Por. A., and sent it to the Dominican Republic where it was kept for about three years and used for drilling two oil wells. The derrick was brought back to the United States in 1948 and was acquired by Trinity which used it, over a four-year period in the drilling of fourteen oil wells. While in the Dominican Republic the derrick was erected, dismantled, moved and re-erected several times, and was exposed on occasions to salt water. *After being acquired by Trinity and prior to the events giving rise to this litigation, the derrick had been dismantled and re-assembled a considerable number of times and had been skidded from one location to another three or four times.*

On the afternoon of June 13, 1952, the derrick had been erected to a height of 136 feet and the erection of the gin pole, which would complete the derrick, was in progress. The gin pole, which is the top part of the derrick, con-

tained four gin pole legs. These are nine-foot lengths of four-inch angle iron welded to plates by which they were to be bolted to horizontal iron beams. When a derrick is complete the gin pole legs are interconnected by other parts of the structure and surmounted by a pyramid-shaped device which forms the top of the derrick. One of the gin pole legs had been bolted in place. At the top of this leg a pulley had been fastened and by means of a line through this pulley and another at the bottom of the derrick girts and braces were being hauled up to the top of the derrick for installation. While this phase of the work was in progress and a load was being hauled up, the gin pole leg pulled loose at the weld, was jerked downward by the weight upon the line and struck the plaintiff who was then working near the top of the derrick. He sustained injuries to his left hand, wrist and forearm.

The plaintiff filed a claim for compensation with the Texas Industrial Accident Board on July 8, 1952. On July 18, 1952, Texas Employers Insurance Association, the compensation insurance carrier of plaintiff's employer, reported that an initial payment of compensation had been made on June 24, 1952. On August 13, 1953, the plaintiff's claim for compensation was settled with the insurance carrier. Suit was filed by plaintiff on April 29, 1954, in the District Court of Ector County, Texas, against Trinity Drilling Company and International. The petition alleged, among other things, that the defendants were negligent in the design, manufacture and assembly of the derrick and in failing to securely weld and strengthen the

gin pole leg. The petition prayed that the defendants, Trinity and International, "be duly cited to appear and answer" the petition and for judgment.

Trinity was served with the process of the Texas court on May 3, 1954, and on May 20, 1954, it removed the case to the United States District Court where it was docketed under Number 2012. After removal by Trinity, process issued out of the Texas court against International and service was attempted on June 10, 1954, by the delivery of a copy of the citation to Ed. Pewitt, a serviceman of International. International then filed its petition for removal and on this removal the cause was docketed in the United States District Court under Number 2038, whereupon International moved to quash the citation and the service thereof upon it on two grounds, first, that on the removal by Trinity the Texas court had lost jurisdiction and the issuance of the citation was a nullity, and second, that service was not effective because not made upon an authorized agent. This motion was granted on September 26, 1954, and on November 18, 1955, an order was entered dismissing case numbered 2038.

On July 28, 1954, a citation was issued out of cause 2012 and served on International. By a motion to dismiss and again by a motion for a directed verdict, International asserted that the action was barred by limitations. The motions were denied. Texas Employers Insurance Association intervened to assert the right of subrogation provided by Vernon's Ann. Tex. Civ. Stat., Art. 8307, §6 a. The cause was tried before a jury, which returned a

verdict against International for $6,250. The verdict exonerated Trinity. Judgment was entered on the verdict, and by the judgment an apportionment of the award was made between the plaintiff and the intervener.

The first question for our consideration is that of limitations. This question is to be resolved by the law of Texas, cf. *Pacific Employers Ins. Co. v. Parry Navigation Co.*, 5th Cir. 1952, 195 F. 2d 372. Among the provisions of the statutes of that State is the following:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
>
> * * * * *
>
> "6. Action for injury done to the person of another.
>
> * * * * *"
>
> Vernon's Ann. Tex. Civ. Stat., Art. 5526.

There are two aspects of the limitation question, one as to the time when the cause of action "accrued" and the other as to when the action was "commenced and prosecuted." On the second of these phases the law of Texas is thus stated:

> "Most of the articles of the Revised Statutes which prescribe periods of limitation for particular actions require that the action be 'commenced and prosecuted' within a designated time after the accrual of the cause of action. In cases to which such provisions are applicable, it is well settled that the running of the statute is not interrupted by the mere filing of a petition with the clerk. Not only must this initial step be taken, but there must be a bona fide intent that process

shall be served at once upon the defendant. In the absence of a valid excuse for delay, the statute runs until citation is issued and service obtained, if the plaintiff by some affirmative act or declaration is responsible for delay in having citation issued and served, or if a bona fide attempt to obtain service is not made. A suit is not commenced by the issuance of process which cannot possibly bring the defendant before the court, or which may be served only in case the defendant may be found temporarily in the state. Needless to say, the running of the statute is interrupted where a suit is filed and the defendant is properly served with citation showing the cause of action against him." 28 Tex. Jur. 192, Limitation of Actions, §99.

In a situation not unlike the one before us it was held by a Court of Civil Appeals of Texas that:

"The filing of a suit within the statutory period is sufficient to stop the running of limitation. The litigant has a right to assume that the officers will do their duty, and that the citation will be served promptly. Where the citation is not issued and served promptly, this does not affect the suit, unless the plaintiff is responsible for the failure of the officers to do their duty, as in cases where the plaintiff instructs the clerk not to issue, or instructs the sheriff, not to serve. Where this is done, it is held that the plaintiff has not a bona fide intention that citation shall issue and be served promptly, and for this reason the filing of the suit does not interrupt the running of the Statute. There is no evidence in this case that the plaintiff and his attorney did not have a bona fide intention that citation should issue and be served.

* * * * *

"No affirmative duty rested upon the plaintiff to do anything further in connection with the citation

> until the plaintiff knew, or, by the exercise of ordinary diligence must have known, that the clerk had failed to do his duty and that citation had not issued." *Allen v. Masterson*, 49 S. W. 2d 855, 856.

The petition was filed prior to the expiration of two years from the date of the injury. There is no contention made that the plaintiff did not intend to have process promptly issued and served. Cf. *Digby v. United States Fidelity and Guaranty Co.*, 5th Cir. 1957, ... F. 2d .... The time period between the filing of the petition on April 29, 1954, in the Texas court and the issuance of process against International on July 28, 1954, after removal to the Federal Court, is not such an interval as will justify an inference of lack of diligence. The Supreme Court of Texas had before it a case where more than two years intervened between the filing of the petition and the issuance of the citation with two months passing before service was made. The court said:

> "Cases might arise where, as from long delay in the issuance of process within the knowledge of plaintiff, he would be presumed to have acquiesced in it, and would consequently be held responsible for it. But we have no such case before us. In the absence of proof to the contrary, it would be presumed that plaintiff used due diligence in the prosecution of his suit, and, if necessary, in the absence of a statement of facts it would be presumed that the citation in the record was not the first citation. We could not presume the contrary. So we conclude that the suit was not barred by neglect of plaintiff to have citation issued." *Tribby v. Wokee*, 74 Tex. 142, 11 S. W. 1089, 1090.

This doctrine runs throughout the Texas decisions over a long period of years. See the cases collected in the A. L. R. annotation to *Hauseman's Administrator v. Poehlman*, 314 Ky. 453, 236 S. W. 2d 259, 27 A. L. R. 2d 233, at pages 253, et seq. Thus it is that the action was "commenced and prosecuted" within the meaning of the statute upon the filing of the petition within two years after the date of the injury. We need not determine whether the accrual of the cause of action was postponed until the intervener made its initial payment to the plaintiff, or until the plaintiff filed his claim with the Texas Industrial Accident Board, or until the later date when the plaintiff and the intervener made a final settlement.

International, the manufacturer, urges that it should escape liability for plaintiff's injury because the use of the gin pole leg for a seven-year period demonstrated, as a matter of law, that it was not imminently or inherently dangerous. It also contends that the injury resulted from a use for which the gin pole leg was not intended and such use and the resulting injury were not reasonably foreseeable. It was formerly the general rule that a manufacturer was not liable to third persons who had no contractual relations with him for injuries resulting from the construction, manufacture or sale of the manufacturer's products. Shearman and Redfield on Negligence, Rev. Ed. §653. The cases so holding are legion, among which are *Huset v. J. I. Case Threshing Machine Co.*, 8th Cir. 1903, 120 F. 865, 61 L. R. A. 303, and the many cases therein cited. In the Huset case are set forth many of the

reasons variously assigned in judicial opinions to support the rule stated. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, a manufacturer placed upon the container of a poison the label of a simple and harmless medicine. The packaged item passed through trade channels to a druggist and was sold to a purchaser who, relying upon the label, took it and was injured. Recovery against the manufacturer was permitted and the original rule, by this and other like decisions, became subject to the qualification that a manufacturer who makes and sells an article inherently dangerous without proper warning of dangers not patently apparent, is liable to one injured thereby who uses the article in a manner which should have been contemplated by the manufacturer. This exception, originally restricted to poisons, explosives and other inherently dangerous articles, was gradually extended. In *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, the manufacturer of a scaffold, which collapsed and killed an employee of the purchaser of the scaffold, was held liable. The liability was not based upon privity but was imposed by reason of a legal duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others. The court said:

> "A stronger case where misfortune to third persons not parties to the contract would be a natural and necessary consequence of the builder's negligence can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life." *Devlin v. Smith*, 89 N. Y. 470, 478, 42 Am. Rep. 311.

In 1916 the leading case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F. 696, Ann. Cas. 1916 C. 440, was decided. The exception was broadened to include liability resulting from the use of things dangerous when negligently manufactured or prepared. Of the rule there adopted it has been said:

> "The doctrine of the MacPherson case is now generally accepted. [Citing authorities.] Its acceptance has brought all dangerous things into the same class as the 'inherently dangerous' things to which the principle already stated has always been applied. The MacPherson case caused the exception to swallow the asserted general rule of non-liability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be part of the law." *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N. E. 2d 693, 700.

The rule which is now generally, though perhaps not universally, recognized has been set forth in the Restatement in this language:

> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured." Restatement, Torts, §395.

Such is the law of Texas. The foregoing pronouncement is quoted and approved in *Johnson v. Murray Co.*, Tex. Civ. App., 90 S. W. 2d 920. See also *Roosth & Genecov*

Production Co. v. White, ... Tex. ....., 262 S. W. 2d 99, reversing in part 257 S. W. 2d 140. The court instructed the jury that it should find for International unless they found that the gin pole leg was imminently or inherently dangerous at the time it was sold by International. The evidence justified the submission of the question to the jury and the verdict resolved the question adversely to International.

The negligence asserted was a defective weld. There was evidence that upon the separation of the welded parts the defect was apparent but that because of being galvanized, it was not previously ascertainable. *International urges that the interval of seven years between the manufacture of the derrick and the accident and the uses and abuses to which the derrick was subjected during that interval require a holding relieving it of liability.* It asks the question, "how long are the courts going to impose liability upon a manufacturer," and expresses the view that public policy requires some definite limitation of liability. *Where the manufactured commodity is one having moving parts, such as in engines or machinery, or is subject to deterioration, such as in some food and drug products, the lapse of time might be an intervening factor which would relieve the manufacturer of liability.* The jury's verdict was implicit in it a finding that the gin pole leg was imminently and inherently dangerous when sold by International. So also does the verdict imply a finding that the intervening uses were not factors contributing to the cause of injury. The evidence supports the verdict

as to liability. *The lapse of seven years does not, per se, relieve a derrick manufacturer from liability for injuries caused by a defective weld overcoated with a galvanizer.* Cf. *Reed & Barton Corporation v. Maas*, 1st Cir., 1934, 73 F. 2d 359.

The final proposition for which International contends is that the gin pole leg was put to a use, at the time of the accident, for which it was not designed or manufactured and a use which was not reasonably foreseeable. The well-settled negligence rule in Texas is that "The ability to have foreseen and prevented the harm is determinative of responsibility." 30B Tex. Jur. 179, Negligence, §8. But,

> "* * * it is not required that the particular accident complained of should have been foreseen. All that is required is that the injury be of such a general character as might reasonably have been anticipated; and that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen. San Antonio & A. P. Ry. Co. v. Behne, Tex. Com. App., 231 S. W. 354, 356." *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 124 S. W. 2d 847, 849, quoted with approval in *Wohlford v. American Gas Production Co.*, 5th Cir. 1955, 218 F. 2d 213.

There is no occasion to question the principle that a manufacturer is entitled to assume that his product will not be subjected to abnormal and unintended uses, and *that no liability follows an injury resulting from an abnormal or unintended use.* Prosser, Torts, 2nd Ed. 503, §84. The evidence, although conflicting, justified a find-

ing that the use to which the gin pole leg was being put at the time of the injury was a common and normal use. A verdict for the plaintiff based on such evidence will not be disturbed.

Finding no reversible error, the judgment is

AFFIRMED.

A True Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX B

Judgments and Orders of the Courts Below

JUDGMENT.

Extract from the Minutes of February 13, 1957.

No. 16076.

INTERNATIONAL DERRICK AND EQUIPMENT COMPANY and its successor, DRESSER EQUIPMENT COMPANY,

v.

R. L. CROIX and TEXAS EMPLOYERS INSURANCE ASSOCIATION, Intervenor.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, International Derrick and Equipment Company and its

successor, Dressor Equipment Company, and the surety on the supersedeas bond herein, Pacific Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

ORDER DENYING REHEARING.

Extract from the Minutes of March 13, 1957.

No. 16076.

INTERNATIONAL DERRICK AND EQUIPMENT COMPANY and its successor, DRESSER EQUIPMENT COMPANY,

v.

R. L. CROIX and TEXAS EMPLOYERS INSURANCE ASSOCIATION, Intervenor.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

* * * * *

Office-Supreme Court, U.S.
FILED
MAY 25 1957
JOHN T. FEY, Clerk

No. 979

In the

Supreme Court of the United States

OCTOBER TERM, 1956

INTERNATIONAL DERRICK AND EQUIPMENT COMPANY, and its successor, DRESSER EQUIPMENT COMPANY,
Petitioner,

v.

R. L. CROIX AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Intervener,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Opinion of the Court of Appeals for the Fifth Circuit is reported at *241 F. 2d 216.*

JURISDICTION

Jurisdiction is sought under the provisions of *28 U. S. C. Sec. 1254(1).* Petition does not disclose "special and important" reasons for review and fails to comply with Supreme Court Rule 19. Petitioner confesses by its statement on Page 4, "Defensively the evidence introduced by

the Petitioner showed * * *" that it seeks limited review on defensive evidence only by disregarding all of the evidence supporting Respondent's favorable jury verdict.

QUESTION PRESENTED

Whether manufacturer is liable for hidden defective factory weld causing injury in normal use of device.

STATEMENT OF CASE

This is a common law negligence case tried in Federal Court on diversity jurisdiction. Respondent, Croix, a rig builder, received permanent injuries (R. 241-242) while working near the top of 136-foot derrick (R. 177) when gin pole leg (a lifting device, R. 78-79) with hidden, defective factory weld (R. 98-99, 118, 152) overcoated with galvanize (R. 119, 121, 336, 344) collapsed under light weight of 250 (R. 97) to 392 pounds (R. 308) as it was being used in a normal, customary and ordinary manner (R. 147, 148, 198, 210, 261). It was designed (R. 89, 161, 173), manufactured (R. 342) and sold (R. 292) with knowledge of use (R. 185, 343, 357) by Petitioner, who advertised and represented the capacity to be 10,000 to 15,000 pounds (R. 183) and 40,000 pounds when assembled (R. 181-182). It was never tested by the factory (R. 183). Derrick with probable life span of fifty years (R. 341) was put to relatively little use having drilled only two wells in three years in the Dominican Republic (R. 319) and only twelve or fourteen wells in four years after being returned to the United States (R. 282). Trial re-

sulted in favorable jury verdict and judgment for Respondent (R. 408), which was affirmed by Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

1. Opinion below was based on jury finding that the gin pole leg was imminently and inherently dangerous when sold by Petitioner, due to defect created and overcoated by galvanize at the factory. The intervening uses were not factors contributing to the cause of injury. The lifting device collapsed in normal use. Complaint here is of adverse verdict and judgment. The Court of Appeals merely construed the verdict. No federal question is involved. The opinion follows the law of Texas:

> "A manufacturer who places in trade and commerce a manufactured article not inherently, but because of its condition imminently, dangerous to life and limb, is liable to one who sustains injury by reason of such condition." Blickman, Inc. v. Chilton, 114 S. W. 2d 646; Liggett & Myers Tobacco Company v. Wallace, 69 S. W. 2d. 857 (Er. dis.).
>
> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured, Restatement, Torts, 395." Johnson v. Murray Company (Tex. CCA), 90 S. W. 2d. 920; Roosth & Genecov Prod. Co. v. White, 262 S. W. 2d 99.

2. We find no conflict of decision. Petitioner cited *Reed and Barton Corp. v. Maas (1st Cir.), 73 F. 2d 359*, which is the only case of parallel facts. The other cited cases are distinguishable in that there was no evidence nor jury finding of factory defect continuously existing from date manufactured to date of injury. This lifting device was dangerous because of defective factory construction. *(MacPherson v. Buick Motor Company, 217 N. Y. 382, 111 N. E. 1050.)*

3. Search of Petition fails to reveal any "special and important" reasons for Certiorari. The evidence has been reviewed by a jury, by the trial judge and by the Court of Appeals for the Fifth Circuit. Judgment was rendered against Petitioner on the evidence.

CONCLUSION

It is respectfully submitted that Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES T. SMITH,
First National Bank Bldg.,
Midland, Texas.

JAMES O. BEAN,
1010 Gulf States Bldg.,
Dallas 1, Texas,

By .....
Attorneys for Respondent.

CERTIFICATE OF SERVICE

R. L. Croix and Texas Employers' Insurance Association (Intervener), Respondent, served three copies of Respondent's Brief in Opposition in accordance with Rule 33, Subsections 1 and 3(b) by depositing copies of the Brief in the United States Post Office at Dallas, Texas, Air Mail, postage prepaid, addressed to Counsel of Record for Petitioner, Paul J. Sedgwick, Barr Building, 910 17th Street N. W., Washington, D. C. and by regular mail addressed to L. W. Anderson, 1201 Corrigan Tower, Dallas, Texas, sending three copies of such Brief to each of them on this the 23rd day of May, 1957.

JAMES O. BEAN,
1010 Gulf States Bldg.,
Dallas 1, Texas,
Attorney of Record for Respondent.